APPEAL NO. 030523
FILED APRIL 15, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on February 11, 2003. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the fourth quarter based on a total inability to work in any capacity.

The appellant (carrier) appealed, disputing findings that the claimant was unable to perform any work, that no documents show the claimant can return to work, and that the claimant's unemployment is a direct result of his impairment. The claimant responded, urging affirmance.

DECISION

Affirmed.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The carrier appeals both the direct result requirement of Section 408.142(a)(2) and Rule 130.102(b)(1) and the good faith requirement of Section 408.142(a)(4) and Rule 130.102(b)(2). The parties stipulated that the relevant qualifying period was from July 29 through October 27, 2002. The claimant had spinal surgery at L5-S1 on July 20, 2000, and apparently continued to have lumbar back complaints. The claimant proceeds on a total inability to work theory.

Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with his or her ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work. The carrier argues that the hearing officer improperly applied this rule. The hearing officer found that the claimant was unable to perform any work at all and referenced several reports from the treating doctor which taken "as a whole . . . provided a narrative report explaining how the injury causes a total inability to work." Those reports, two of which were just after the qualifying period, together with another report two months later are marginally sufficient to support the hearing officer's determination.

Both parties and the hearing officer cite a functional capacity evaluation (FCE) ordered by the treating doctor and performed on July 17, 2002 (shortly before the qualifying period). The summary states: "Based on the physical assessment and the Physical Demand Characteristics of Work, the patient is capable of physically performing at the SEDENTARY Category." The carrier points to this sentence as being an "other record" which shows that the claimant is able to return to work. However, the

FCE goes on to recommend that the claimant "be referred for a pain management program where the combination of psychological or psychiatric intervention with a therapeutic exercise program may assist him," and notes that the claimant is in moderate depression which "may be an obstacle to effective rehabilitation and return to work." The FCE references some of the claimant's responses to a questionnaire and comments that the responses are a call for help, which have "the potential to lead to more serious problems if left unanswered." The hearing officer referenced the FCE recommendation and commented that the claimant was not ready to return to work.

In Texas Workers' Compensation Commission Appeal No. 020041-s, decided February 28, 2002, citing Texas Workers' Compensation Commission Appeal No. 002196, decided October 24, 2000, the Appeals Panel stated that "in cases where a total inability to work is asserted and there are other records which on their face appear to show an ability to work, the hearing officer is not at liberty to simply reject those records as not credible without explanation or support in the record." In this case the hearing officer indicated why she believed that the statement that the claimant was physically capable of performing in the sedentary category did not show an ability to return to any kind of work based on the recommendations in the FCE and need for "psychological or psychiatric intervention." The hearing officer's explanation is supported by the record.

The hearing officer's decision is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly the hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **ABERDEEN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CHARLIE MILLER
10370 RICHMOND AVENUE
HOUSTON, TEXAS 77042.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Judy L. S. Barnes
Appeals Judge

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Roy L. Warren
Appeals Judge